

**HB 575****FROM THE TONGUE RIVER WATER USERS' ASSOCIATION**

SINCE BEFORE STATEHOOD, MONTANA HAS RELIED ON THE "FIRST IN TIME, FIRST IN RIGHT" PRIOR APPROPRIATION DOCTRINE TO GUIDE THE ORDERLY DEVELOPMENT OF RESOURCES IN MONTANA, INCLUDING AGRICULTURE.

MONTANA'S 1889 CONSTITUTION RECOGNIZED AND CONFIRMED WATER RIGHTS, AND THE 1972 CONSTITUTION CARRIED OVER THE SAME CONCEPT, ARTICLE IX, SECTION 3(1) STATES "ALL EXISTING RIGHTS TO THE USE OF ANY WATERS FOR ANY USEFUL OR BENEFICIAL PURPOSE ARE HEREBY RECOGNIZED AND CONFIRMED."

WE DO NOT NEED SB 575. WE DO NOT NEED TO UPROOT THE PRIOR APPROPRIATION DOCTRINE TO ALLOW LOCALS TO USE THIS WATER. THIS IS A CONTROLLED GROUNDWATER AREA. POWDER RIVER BASIN CONTROLLED GROUNDWATER AREA ALREADY ALLOWS FOR LOCALS TO USE THE WATER. SEE 2<sup>ND</sup> DOCUMENT HANDED OUT, P. 4, ¶¶ 3 & 4. DNRC HAS ARGUED THAT IT CAN'T DO THIS, CITING TO THE FACT THAT THE SYSTEM IS NOW MANIFOLDED. BUT UNDER SB 120 THAT WAS SIGNED BY THE GOVERNOR ON MARCH 25, 2009, THE DNRC CAN PROMULGATE A RULE AMENDING THE PRBCGA ORDER AND STILL ALLOW LOCAL PEOPLE TO USE THE WATER, AND ALLOW FIDLEITY TO FURNISH THEM WATER. IT WOULD STILL BE GROUNDWATER, AND THEY COULD GET A CERTIFICATE OF WATER RIGHT JUST LIKE EVERYONE ELSE MUST.

BY CHANGING THIS FROM GROUNDWATER TO SURFACE WATER, THIS BILL DEPRIVES THOSE WITH SENIOR WATER RIGHTS OF THEIR FUNDAMENTAL DUE PROCESS RIGHT TO PROTECT THEIR PRIVATE PROPERTY RIGHTS.

WATER RIGHTS ARE VALUABLE PROPERTY RIGHTS. JUDGE HONZEL'S DECISION AT PP. 4-5 CUTS TO THE HEART OF THE DUE PROCESS ISSUE.

MONTANA COURTS SINCE STATEHOOD HAVE RECOGNIZED THAT WATER RIGHTS ARE VALUABLE PRIVATE PROPERTY RIGHTS, AND THAT SIGNIFICANT PORTION OF THE VALUE IS THE PRIORITY DATE.

MONTANA'S COURTS HAVE ALWAYS RECOGNIZED THAT WATER RIGHTS ALSO ADD SIGNIFICANT VALUE TO THE LANDS THAT THEY ARE APPERTUNANT TO.

IF YOU HAVE A RANCH WITH WATER RIGHTS, IT IS MUCH MORE VALUABLE THAN A RANCH OR PIECE OF PROPERTY WITHOUT WATER RIGHTS. AND THE OLDER THE WATER RIGHT, THE MORE VALUABLE IT IS BECAUSE SENIOR RIGHTS CAN MAKE A CALL ON THE WATER IN TIMES OF SHORTAGE.

WE DO NOT NEED TO GUT THE PRIOR APPROPRIATION DOCTRINE TO ALLOW LOCAL INTERESTS TO USE THIS WATER.

A FINAL POINT. REP. MCCHESENEY STATED ON THE HOUSE FLOOR THAT NORTHERN PLAINS RESOURCE COUNCIL IS THE ONLY ONE WHO SHOWED UP AND SPOKE OUT AGAINST THIS BILL. THAT IS INACCURATE. MEMBERS OF THE TONGUE RIVER WATER USERS' ASSOCIATION DROVE MANY MILES TO TESTIFY AGAINST THIS BILL, AS DID MEMBERS OF THE NORTHERN CHEYENNE TRIBE.

TRWUA HAS OVER 75 MEMBERS, INCLUDING INDIVIDUAL, OTHER ORGANIZATIONS, AND INCLUDING THE NORTHERN CHEYENNE TRIBE. WE HAVE A VERY REAL INTEREST IN PROTECTING MONTANA'S WATER RESOURCES. TRWUA WAS FORMED IN 1937 AND HAS CONTRIBUTED TAX DOLLARS AND AGRICULTURAL PRODUCTS TO MONTANA FOR 72 YEARS. DON'T THROW THEIR WATER RIGHTS AWAY.

I RESPECTUFLLY URGE THAT YOU VOTE NO ON HB 575.

Brenda Lindlief Hall  
Attorney for the Tongue River Water Users' Association  
(406) 442-3261

## **HB 575: LAST IN TIME, FIRST IN RIGHT**

- HB 575 calls ground water that is produced during coal bed methane production surface water. This change in semantics **dismantles Montana's 120 year-old "first in time, first in right" prior appropriation doctrine, which is the bedrock of agriculture in Montana.**
- **HB 575 leaves Montana Ranchers and American Indians with rights to this water in the dust.** It strips away all protections for people with ground water rights, valuable property rights protected by Article IX, Section 3(1) of the Montana Constitution. And it potentially interferes with Indian Reserved water rights and Compact rights. The Northern Cheyenne Tribe relies on this sacred water.
- This is **special legislation for one company.** Fidelity Exploration & Production Company is the only CBM company seeking a water right in Montana (see p. 2, saying the permits apply to "distribution." See also New Section 9 on the last page applying to pending applications). **Fidelity would get a super priority**, while virtually everyone else who wants a water right must get a permit for either ground water or surface water.
- HB 575 is designed to overturn 2 water rights cases that Fidelity lost. The judge said **CBM water is ground water, and the point of diversion is the ground where** the CBM wells pump the water from the aquifers. This has always been the law!
- In Montana, you can't put a pump in the river and take the water without a surface water permit, and you can't put a well in the ground and take the water without a ground water permit.
- HB 575 makes an extraordinary exception for Fidelity—for one company that will not be around forever, and jeopardizes our people who have been here for since before statehood.
- HB 575 **requires** the Department of Natural Resources and Conservation (DNRC) to grant permits to people who do not have water rights.
- **HB 575 is not needed!** The area where CBM development is occurring is a designated "Controlled Groundwater Area." The Water Use Act (85-2-306(2)) only allows appropriations in a Controlled Groundwater Area Order under an Order of the DNRC or by a special permit. **The Powder River Basin Controlled Groundwater Area Final Order has provision allowing "local interests" to use the water. We do not need to change ground water into surface water.**
- **This legislation is not designed to help Montana ranchers or coalmines.** It is meant solely to enable CBM development. In doing so, **it intrudes on the private property rights of Montana's ranchers** and Indian Tribes, and jeopardizes their lives and livelihoods. Nobody but Fidelity is lined up to get a water right for CBM water. **HB 575 is special legislation that enables one gas company to gain control over one of Montana's most precious resources—our water.**
- **Vote NO on HB 575**

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

---

**FINAL ORDER**

**IN THE MATTER OF THE DESIGNATION OF THE POWDER RIVER BASIN  
CONTROLLED GROUNDWATER AREA**

---

Pursuant to the Montana Water Use Act, Mont. Code Ann. \_ 85-2-506, and after notice required by law, public hearings were held on September 22 and 23 in Lodge Grass, Colstrip, Miles City, and Broadus to consider the Montana Department of Natural Resources and Conservation's proposal to designate a controlled groundwater area for the Powder River Basin in anticipation of expected groundwater withdrawals associated with coal bed methane development in the area. Comments were accepted into the record at the hearings and written comments were accepted through October 8, 1999. Based on the information gathered by the Department, the input of other agencies, and the public comment received the Department has modified its proposed findings, conclusion, and order as will follow. The public comment is addressed in the Memorandum that appears at the end of this order.

**FINDINGS OF FACT**

1. Coal bed methane extraction technology requires groundwater withdrawal to lower groundwater levels and reduce water pressures in the coal beds. Wells may be placed at regular intervals over large areas covering many square miles. The wells are pumped continuously with the specific intent of lowering water pressures in the coal bed. Lowering water pressures will lower water levels in the aquifer.
2. During coal bed methane development, water is removed only from coal aquifers. Other aquifers in an area in a coal bed methane development area may or may not be affected depending upon connections between aquifers.
3. Coal beds are important regional aquifers in water-scarce southeastern Montana. The coal aquifers are often the only practical source of fresh water for domestic, stock, and agricultural uses by the people in the area.

4. The complexities of geology and hydrogeology and the uncertainty about the extent and precise location of future coal bed methane development do not allow an accurate assessment of conflicts with existing and future beneficial water use. However, there is considerable data available showing significant effects on water levels in coal aquifers from extensive and continuous pumping of water from coal mines in the Decker area.
5. Since coal bed methane development is of limited duration, 20 to 30 years, in any particular field, and because the aquifer is not otherwise disturbed, water in the aquifer most likely will recover to its pre-development level. However, even if an aquifer were to recover rapidly after development, the long period of development could cause severe hardship to local water users. Moreover, interrelationships among aquifers along with future precipitation patterns could cause unpredictable results.
6. Assessment of localized effects of coal bed methane development on water availability would require compiling baseline data from existing wells, before methane gas development, along with data from test wells and coal bed methane production wells. Monitoring of water levels, water pressures and pumping rates during development would also be necessary to determine the effects.
7. The Department of Natural Resources and Conservation usually considers a one-half mile radius from any particular water well as the zone of possible influence from the well. When the Department receives an application for a water well the owners of all existing wells within that radius are notified. Available information does not justify an assumption that wells for coal bed methane development should be considered any different. However, neither does the information justify any assumption that wells or springs over a half a mile from coal bed methane development will not be affected. Baseline information should be gathered for any well within the general location of coal bed methane development so that the effects can be monitored.
8. Although withdrawing groundwater is integral to the coal bed methane extraction method, water is not a desired product of the operation, and must be disposed. Since the withdrawal of the water is not a use of the water per se, a water use permit from the DNRC is not required for withdrawing the water. Public authorities do not otherwise regulate the withdrawal of ground water in the area except as it relates to coal mining.
9. Water withdrawn during coal bed methane withdrawal may be suitable for use by local residents, agriculture, and business. Wells drilled for coal bed methane development could in some cases be developed as water sources for local residents, agriculture, and business.

10. Wells that are inadequately sealed present a hazard of contaminating water in one aquifer with contaminants from another aquifer or introducing methane into non-coal aquifers. The Board of Oil and Gas Conservation regulates well construction and enforces standards for sealing gas wells. These standards are in excess of the standards of sealing water wells enforced by the Montana Board of Water Well Contractors.
11. Since water withdrawn from the aquifers is not otherwise consumed, the water must be discharged in some matter. Any applicable water discharge permits must be obtained, and water disposal requirements must be met, before groundwater may be discharged, re-injected, or disposed in the Controlled Groundwater Area. Water discharge permits may include the Montana Pollutant Discharge Elimination System (MPDES) permit from the Department of Environmental Quality (DEQ), for discharge to surface water, and the Underground Injection Control (UIC) permit from the Board of Oil and Gas Conservation, for discharge re-injected to groundwater.
12. Extensive coal bed methane development has occurred from coal-bearing strata within the Powder River Basin geologic structure in Wyoming and some development has occurred in Montana near Decker. The Powder River Basin geologic structure and associated coal-bearing strata extends north into southeastern Montana. Consequently, coal bed methane development will likely extend further north into southeastern Montana in the near future.
13. The proposed controlled groundwater area includes the Wasatch Formation and the Tongue River Member of the Fort Union Formation. The formations are the two principle coal-bearing strata in southeastern Montana. The area forms a generally contiguous block of these coal-bearing formations within the Montana part of the Powder River Basin (see Map 1). According to the Montana Bureau of Mines and Geology (MBMG), the area includes all known strippable sub-bituminous coal deposits greater than 30 inches thick in southeastern Montana. (MBMG SP28, Figure 10).
14. Montanans have a right to a clean and healthful environment.

## CONCLUSIONS OF LAW

1. Excessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the area proposed for controlled ground water designation. By "excessive", the Department means that water levels in targeted aquifers could be reduced near project areas for long periods of time in a water-scarce area.

2. The public health, safety, and welfare require that such extensive water withdrawals in a water-scarce area are monitored and the water withdrawals be controlled where existing beneficial uses of water are adversely affected. Without this designation of a controlled ground water area the extensive withdrawals of ground water anticipated may proceed uncontrolled.
3. With this designation of a controlled groundwater area the withdrawal of groundwater associated with coal bed methane production will be under the prior jurisdiction of the Montana Board of Oil and Gas. However, water rights matters and hydrogeologic issues are not within the ordinary technical expertise and area of concern to the Board. These are matters ordinarily dealt with by the Montana Department of Natural Resources and Conservation and the Montana Bureau of Mines and Geology. The Montana Department of Natural Resources may petition the Board for hearings in regard to the production, use, and disposal of water from coal bed methane development wells that could effect existing water rights in the area based upon information gathered concerning water withdrawals.
4. This controlled groundwater designation will not affect regulation of new water rights for conventional water uses. If local interests wish to acquire water rights to wells constructed during coal bed methane development, a beneficial use permit will be required. Standard exceptions to permit requirement will still apply. For example, a permit will not be required for appropriations of 35 gallons per minute or less and not exceeding 10 acre-feet per year on wells developed for beneficial use. Laws for ground water withdrawals that do not require a water use permit such as conventional oil and gas activities, mining, or agricultural drainage, will remain in effect as in other parts of the state.
5. Discharges of water during coal bed methane development, and well sealing to prevent leakage and contamination are sufficiently regulated by the DEQ and Board of Oil and Gas.
6. The designation of a controlled groundwater area does not infringe on the rights of Montana citizens to a clean and healthful environment.

7.

## **ORDER**

The following described area, as also delineated on Map 1 attached, is designated a Controlled Groundwater Area under Mont. Code Ann. 85-2-506: all sections in Township 06N, Ranges 45E and 46E; all sections in Township 05North, Ranges 40East – 47 East; all sections in Township 04 North, Ranges 38 East, 39 East, 41East – 46 East,

and 48 East; all sections in Township 03 North, Ranges 37 East – 49 East; all sections in Township 02 North, Ranges 36 East – 50 East; all sections in Township 01 North, Ranges 36 East – 50 East; all sections in Township 01 South, Ranges 37 East – 50 East; all sections in Township 02 South, Ranges 37 East – 51 East; all sections in Township 03 South, Ranges 37 East – 51 East; all sections in Township 04 South, Ranges 37 East – 51 East; all sections in Township 05 South, Ranges 36 East – 50 East; all sections in Township 06 South, Ranges 36 East – 51 East; all sections in Township 07 South, Ranges 37 East – 51 East; all sections in Township 08 South, Ranges 37 East – 51 East; and all sections in Township 09 South, Ranges 37 East – 51 East. The controlled groundwater area includes all formations above the Lebo member of the Fort Union Formation.

### **1. Applicability to coal bed methane wells only.**

This controlled groundwater area designation shall apply only to wells designed and installed for the extraction of coal bed methane (CBM).

### **2. Standards for Permitting, Drilling, and Producing Coalbed Methane Wells**

CBM development within the controlled groundwater area must follow the standards for drilling, completing, testing, and production of CBM wells as adopted by the Board of Oil and Gas Conservation. Standards include: field development proposals including initial test wells and development plans; maps of the targeted coal bed; an inventory and hydrologic assessment of existing wells, springs, and streamflow that could be impacted by the operation; and means to mitigate water resource impacts. The Board of Oil and Gas Conservation shall consider applications for each coal bed methane production field. Approval of specific field rules may include requirements and restrictions in addition to the general operating standards.

### **3. Water Source Mitigation Contract**

Coal bed methane operators must offer water mitigation agreements to owners of water wells or natural springs within one-half mile of a CBM field proposed for approval by the Board or within the area that the operator reasonably believes may be impacted by a CBM production operation, whichever is greater. This area will be automatically extended one-half mile beyond any well adversely affected. The mitigation agreement must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the CBM project and shall be under such conditions as the parties mutually agree upon. Mitigation agreements are intended to address the reduction or loss of water resources and may exclude mechanical, electrical,



or similar loss of productivity not resulting from a reduction in the amount of available water due to production from CBM wells. The areas covered by mitigation agreements will be considered in review of field development proposals. The TAC will make recommendations to the Board of Oil and Gas Conservation if it identifies a need to increase the required mitigation area.

#### **4. Technical Advisory Committee**

The DNRC will designate a Technical Advisory Committee (TAC) with specific expertise in coal aquifer hydrology and shallow groundwater systems. The committee will oversee the groundwater characteristics and monitoring, and the reporting requirements identified in items 5 and 6 below. The TAC will also review groundwater data and scientific evidence related to the Powder River Basin Controlled Groundwater Area and advise the agencies on administration of the area.

The committee will consist of qualified scientists with experience related to the hydrogeology of coal aquifers and CBM extraction operations. The appointments and selections shall be to ensure, to the extent possible, that the committee includes members with expertise in hydrogeology, water quality, and CBM extraction systems and operations.

The TAC will periodically review groundwater data gathered from CBM development. This TAC will prepare an annual report each year, of their findings regarding the impact to the groundwater resource from CBM activities and any mitigation recommendations they may develop. The TAC may submit reports more often if they find it appropriate. Additionally, the TAC will make recommendations to the Board of Oil and Gas Conservation regarding development of specific groundwater characterization, monitoring, and reporting requirements for field developments.

#### **5. Groundwater Characterization, Monitoring, and Reporting**

Hydrologic conditions in the targeted coal beds must be assessed prior to field development to establish baseline conditions. Specific requirements of the field rules will dictate that groundwater pressure is monitored in appropriate locations using dedicated monitoring wells, and that groundwater monitoring and reporting is conducted in a manner consistent with the recommendations outlined in the attached memorandum (Attachment A). In addition to all forms required by the Board of Oil and Gas Conservation Completion, a Montana Well Log Report, DNRC Form 603, must be completed for both production and monitoring wells when the wells are drilled and sent to DNRC at the address on the form within 60 days of the well completion.

The specific requirements for each production field will be developed with consideration of recommendations from the TAC. The procedures will include dedicated groundwater monitoring wells outside of, and surrounding the production field. The operator will be required to seek landowner approval to install such wells at appropriate distances from the field. State or federal lands should be considered. If the operator demonstrates that no site is available at appropriate distance, a well at the extreme outer limit of the operator's lease area may suffice. Dedicated groundwater monitoring wells must be placed in the next aquifer above and below the targeted coal seam, if applicable, within the production field. Also, as a minimum requirement, at least one 24-hour aquifer test must be conducted using at least one observation well, and baseline groundwater pressures and water quality data must be obtained from the monitoring wells prior to production.

## **6. Data Collection and Notice Procedures**

Data collected from testing and production of CBM wells and any groundwater monitoring wells and springs required by the Board of Oil and Gas Conservation will be available to the public and provided to the Montana Bureau of Mines and Geology. The Board of Oil and Gas Conservation will notify DNRC of applications relating to CBM field development proposals so that the Department may supply a mailing list of potentially affected water right holders within one-half mile of the proposed field area. The Board will publish notice in accordance with its existing procedures and will additionally require the developer to send individual notices to the water right holders listed by the DNRC.

## **NOTICES**

### **1. Precautions in Coalbed Methane Areas**

Water well developers and drillers must exercise caution when drilling water wells in or near coal bed methane projects as free methane gas may be encountered in one or more coal beds. Drillers should contact the Board of Oil and Gas Conservation Office at (406) 656-0040 for information about coal bed methane activities in their area of interest.

### **2. Beneficial Use of Water**

Beneficial uses of water produced from CBM operations, such as for stock ponds, wildlife ponds, or irrigation requires a water right issued by DNRC as provided by law.

### 3. Water Discharge and Re-injection

The DEQ Water Protection Bureau at (406) 444-3080 administers the Montana Pollution Discharge Elimination System permit. The Board of Oil and Gas Conservation at (406) 656-0040 administers the Underground Injection Control permit.

Dated this \_\_\_\_\_ day of December 1999.

---

Arthur Clinch, Director  
Dept of Natural Resources and Conservation  
1625 Eleventh Avenue  
Helena, Montana 59620  
(406) 444-2074

---

### MEMORANDUM

The public hearings on the establishment of the Powder River Basin Controlled Groundwater Area were well attended and the Water Resources Division received substantial written comment. The public comment was unanimous in its concern that scarce water resources and existing water uses in the area be protected and overwhelmingly favored establishing a controlled groundwater area. The only dissent to the DNRC proposal did not object so much to the underlying goal of protecting the groundwater resource, but was more concerned that existing regulation was being duplicated.

Local public support for a controlled groundwater area is critical. The Powder River Basin situation is unique in its vast area, its water scarcity, the volume of withdrawals contemplated, and the immediacy of those withdrawals. The DNRC therefore initiated the process for establishing the area on its own motion rather than waiting for a local petition. If, however, it had appeared during the information-gathering period that the public was not interested in or did not favor establishing the area, the DNRC would not have gone forward with the proposal. After all, it is local water users that a controlled groundwater area is designed to protect.

The comment generally expressed concerns about a lack of information about the possible impacts of, and lack of government control and coordination over, water withdrawals and discharges during coal bed methane development. The DNRC has attempted to address these concerns with the modified findings, conclusion, and order.

The most important component of the modified order is the requirement to record and gather baseline and monitoring data so that problems and impacts can be detected as they occur. Of equal importance may be the establishment of a technical advisory committee to review, analyze, and make recommendations concerning the information gathered. The technical advisory committee can also review information provided by local water users. Judging from the public comment, the local land owners will be more than willing to provide any information they might have that will help the committee to track the impacts of the water withdrawals. Without such information and review, attempts to mitigate any adverse impact and to implement any necessary control over the development would be difficult. Individual water users generally do not have the resources to put together the information required to implement controls or mitigate impacts.

The modified order has also attempted to address concerns about the lack of coordination and duplication of regulation between government agencies. For example, the modified order recognizes the jurisdiction of the Montana Department of Environmental Quality over water discharges. The public comments expressed grave concern about the quality of the water and the DEQ has been apprized of that concern. The DNRC, however, will not be regulating in that area. It has also been determined that the Montana Board of Oil and Gas already has sealing standards for wells that will protect aquifers from contamination so that there is no reason to apply such standards as a condition of the controlled groundwater area.

One notable addition to the findings and conclusions concerns a Montana citizen's right to a clean and healthful environment guaranteed by Article II, Section 3 of the Montana Constitution. A recent Montana Supreme Court Decision, *Montana Environmental Information Center et al. v. Department of Environmental Quality*, 1999 MT 248, holds that the right to a clean and healthful environment is fundamental. Since water is vital, it would seem then that the Department would be remiss not to consider the environmental implications of establishing this controlled groundwater area. The Department believes that establishing the area will not intrude on the right to a clean and healthful environment, but rather will help to establish a means by which that right can be protected.

In conclusion, the DNRC was gratified by the interest and support expressed for the controlled groundwater area. When the community center in Broadus is filled to capacity

and a petition with over 150 signatures from that sparsely populated area is submitted it cannot be ignored. The DNRC will reciprocate by keeping the public informed of all developments. The DNRC also appreciates the attendance by Redstone Gas Partners at each of the public meetings and the cooperation they have shown throughout this process. The DNRC has considered the comments of all the participants and those comments have entered into the fashioning of this final order.

RECEIVED  
2008 DEC 15 P 3:59  
JUDGE  
J. DUNN  
DEPUTY

**RECEIVED**  
DEC 16 2008  
REYNOLDS, MOTL &  
SHERWOOD

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

NORTHERN PLAINS RESOURCE  
COUNCIL, INC., and TONGUE RIVER  
WATER USERS' ASSOCIATION,  
  
Plaintiffs and Petitioners,  
  
v.  
  
MONTANA DEPARTMENT OF  
NATURAL RESOURCES AND  
CONSERVATION and FIDELITY  
EXPLORATION & PRODUCTION  
COMPANY,  
  
Defendants and Respondents.

Cause No.: CDV-2007-425

**MEMORANDUM AND ORDER  
ON PETITION FOR JUDICIAL  
REVIEW**

Petitioners Northern Plains Resource Council, Inc. (Northern Plains),  
and Tongue River Water Users' Association (Water Users) have petitioned for  
judicial review of the final order issued May 31, 2007, by Respondent Montana  
Department of Natural Resources and Conservation (DNRC). The order granted  
Respondent Fidelity Exploration & Production Company (Fidelity) a beneficial  
water use permit to market in Montana the water Fidelity pumps from the ground  
during the production of coal bed methane gas. Following extensive briefing, the  
petition was heard October 10, 2008. Having fully considered the arguments

1 presented and having reviewed the applicable parts of the administrative record,  
2 the Court concludes that the final order should be reversed and the case remanded  
3 to DNRC for further proceedings.

#### 4 **BACKGROUND**

5 Fidelity extracts coal bed methane gas from coal beds located in what  
6 is known as the CX Field in the Powder River Basin, Bighorn County, Montana.  
7 As part of the extraction, water is withdrawn from the ground along with the gas.  
8 The initial withdrawal of the water is regulated by the Montana Board of Oil and  
9 Gas Conservation, not DNRC. Section 85-2-510, MCA.

10 Pursuant to Section 85-2-311, MCA, Fidelity applied to DNRC for a  
11 beneficial water use permit to market water produced during the extraction  
12 process. The application sought to appropriate up to 3,863 acre-feet of water per  
13 year to market to potential users in Big Horn County. Fidelity also applied to  
14 appropriate up to 3,000 acre-feet of water per year for marketing in Wyoming.  
15 Northern Plains, the Water Users, and others objected to Fidelity's applications,  
16 and DNRC scheduled a contested case proceeding pursuant to the Montana  
17 Administrative Procedure Act, Section 2-4-601, *et seq.*, MCA.

18 On January 3, 2007, the hearing examiner issued his order on scope  
19 of issues for the hearing. He held that the water which Fidelity sought to put to  
20 beneficial use is not ground water and that the point of diversion is Fidelity's  
21 pipeline. He also ruled that Fidelity properly split what originally was one  
22 application into two applications. Finally, the hearing examiner declined to  
23 address Petitioners' constitutional arguments, explaining that he was without  
24 jurisdiction to consider those arguments.

25 /////

1 On May 31, 2007, DNRC issued its final order which granted the  
2 Montana application and denied the Wyoming application. Petitioners timely filed  
3 this action for judicial review of the decision granting the Montana application.  
4 Fidelity has petitioned for judicial review of the decision denying the Wyoming  
5 application, Cause No. CDV-2007-612, of this Court. This Memorandum and  
6 Order addresses only the Montana application.

7 **STANDARD OF REVIEW**

8 A district court's review of an administrative agency's final order is  
9 governed by the Montana Administrative Procedure Act. The standard of review  
10 is set forth in Section 2-4-704(2), MCA, which provides:

11 (2) The court may not substitute its judgment for that of the  
12 agency as to the weight of the evidence on questions of fact. The  
13 court may affirm the decision of the agency or remand the case for  
14 further proceedings. The court may reverse or modify the decision if  
15 substantial rights of the appellant have been prejudiced because:

16 (a) the administrative findings, inferences, conclusions, or  
17 decisions are:

- 18 (i) in violation of constitutional or statutory provisions;  
19 (ii) in excess of the statutory authority of the agency;  
20 (iii) made upon unlawful procedure;  
21 (iv) affected by other error of law;  
22 (v) clearly erroneous in view of the reliable, probative, and  
23 substantial evidence on the whole record;

24 (vi) arbitrary or capricious or characterized by abuse of  
25 discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were  
not made although requested.

A district court reviews a contested administrative decision "to determine whether  
findings of fact are clearly erroneous and whether the agency correctly interpreted  
the law." **O'Neill v. Dep't of Revenue**, 2002 MT 130, ¶ 10, 310 Mont. 148, ¶ 10,  
49 P.3d 43, ¶ 10.

////

////



## 1

2

3

4

5

7

1 precluding them from presenting any evidence on whether Fidelity's application  
2 would adversely affect their water rights.

3           The water at issue is "industrial waste" or an unwanted by-product of  
4 the extraction process. N. Plains Res. Council v. Fid. Exploration & Dev. Co.,  
5 325 F.3d 1155, 1160-61 (9th Cir. 2003). Fidelity does not have a water right for  
6 the water. However, it must manage the disposal of the water in accordance with  
7 Section 82-11-175, MCA.

8           Fidelity's application states that the source of the water is developed  
9 water from coal bed methane gas production in the CX Field. According to the  
10 application, the point of diversion is Fidelity's centralized water management  
11 system which consists of wells, pipelines, pumping stations, and storage facilities.

12           In his January 3, 2007 order, the hearing examiner refers to the water  
13 as "water developed through CBM development." He states that Fidelity's  
14 application is for an appropriation of water from its pipeline.

15           The Court is not sure what Fidelity means by developed water.  
16 Developed water is not a term used in the constitution or in any of the statutes  
17 cited to the Court. As found by the Ninth Circuit, the water is simply an unwanted  
18 by-product which is drawn from the ground during the production of coal bed  
19 methane gas.

20           The CX Field is large, covering all of two townships, thirty-three  
21 sections in a third township, and a half section in a fourth township. At the time of  
22 the application, Fidelity operated 437 wells in the CX Field and had plans to bring  
23 into production 250-300 new wells per year. While Fidelity identifies its CX Field  
24 pipeline system as the point of diversion, the water is brought to the pipeline from  
25 the ground through the wells. Thus, the water only gets to the pipeline because it

1 is pumped from the ground which is the source of the water and the point of  
2 diversion.

3 Section 85-2-501(4), MCA, defines ground water as "any water that is  
4 beneath the ground surface." Each of the statutes cited by the hearing examiner  
5 relates to ground water. Section 85-2-306(2)(b), MCA, provides that ground water  
6 within a controlled ground water area may be appropriated only "according to the  
7 requirements of an order issued pursuant to 85-2-507." Section 85-2-507, MCA,  
8 addresses orders establishing or modifying controlled ground water areas.

9 Section 85-2-510, MCA, provides that in a controlled ground water  
10 area, water which is produced entirely as a result of oil and/or gas withdrawals is  
11 "under the prior jurisdiction of the board of oil and gas conservation." Prior  
12 jurisdiction does not mean exclusive jurisdiction. Moreover, the statute does not  
13 lead to an inference, much less to a conclusion of law, that the water which is  
14 pumped from the ground in the course of extracting coal bed methane gas,  
15 automatically becomes something different than ground water for purposes of  
16 appropriation. The source of the water is still the ground and the point of diversion  
17 is the ground.

18 Finally, Section 82-11-175(2), MCA, provides in part: "Ground water  
19 produced in association with a coal bed methane well must be managed in any of  
20 the following ways: (a) used as irrigation or stock water or for other beneficial  
21 uses in compliance with Title 85, chapter 2, part 3." Title 85, chapter 2, part 3 is  
22 the section of the code dealing with appropriations, permits, and certificates of  
23 water rights.


24 Based on these statutes, the Court concludes that what Fidelity  
25 applied to appropriate was ground water, not pipeline water. If the legislature

1 intended something different it could have said so, but did not.

2 For the foregoing reasons,

3 **IT IS ORDERED** that the final order of the Montana Department of  
4 Natural Resources and Conservation issued May 31, 2007 IS REVERSED, and the  
5 beneficial water use permit granted to Fidelity Exploration & Production Company  
6 IS DECLARED VOID. The matter IS REMANDED to the Montana Department  
7 of Natural Resources and Conservation for further proceedings.

8 DATED 15<sup>th</sup> day of December 2008.

9  
10   
11 THOMAS C. HONZEL  
12 District Court Judge

13 pcs: Jack R. Tuholske  
14 Brenda Lindlief Hall  
15 Jon Metropoulos/Dana L. Hupp  
16 Donald D. MacIntyre  
17 Anne W. Yates/Candace F. West  
18 Fred W. Robinson

19  
20  
21  
22  
23  
24  
25  
18 d/TCH/Northern Plains Resource v. DNRC & Fidelity CDV-07-425